

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

7800 PLAZA OWNERS ASSOCIATION AND
CONCERNED NEIGHBORS FOR THE
PRESERVATION OF OUR COMMUNITY
(OWNERS AND NEIGHBORS),

Petitioners,

v.

CITY OF MERCER ISLAND,

Respondent.

**CASE No. 19-3-0002c
(Owners and Neighbors)**

**ORDER OF CONSOLIDATION, NOTICE
OF HEARING, AND PRELIMINARY
SCHEDULE**

I. THE PETITION

On January 22, 2019, 7800 Plaza Owners Association (Owners) filed a Petition for Review (PFR) challenging the City of Mercer Island's (City's) adoption of Ordinance No. 18-13, which amended the comprehensive plan,¹ and adoption of Ordinance No. 18C-14, described in the PFR as a site-specific rezone.² On January 29, 2019, Concerned Neighbors for the Preservation of Our Community (Neighbors) filed a Petition for Review challenging Ordinance No. 18-13. Cheryl Pflug is the Presiding Officer. Deb Eddy and Bill Hinkle will also serve on the panel to hear this matter.

II. CONSOLIDATION

RCW 36.70A.290(5) provides:

The board shall consolidate, when appropriate, all petitions involving the

¹ Specifically, Petitioner challenges Amendment 15 in Attachment B of Ordinance 18-q3.

² Both Ordinances were adopted November 20, 2018.

1 review of the same comprehensive plan or the same development regulation
2 or regulations.

3 Pursuant to RCW 36.70A.290(5), the Board hereby consolidates Case Nos.19-3-
4 0001, and 19-3-0002. The case number for the new consolidated case will be **19-3-0002c**.
5 The case will now be entitled Owners and Neighbors v. City of Mercer Island.
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7 **III. STATEMENT OF CHALLENGE AND ISSUES**

8 Owners challenges both Ordinance Nos. 18-13 and 18-14C. Owners' Issue 22
9 alleges a SEPA violation and identifies specific guidelines in WAC 197-11, but omits a
10 reference to RCW 43.21C. Neighbors explicitly challenges only Ordinance No. 18-13, but its
11 Issues 3 and 4³ could also be construed to challenge Ordinance 18-14C. Having only
12 received Neighbors' electronic filing to date, the Board cannot yet compare the petition
13 language to the exhibits documenting the challenged actions.
14

15 Additionally, Neighbors has numbered its issues 1-6 and 10-12, omitting issues 7-9.
16 Owners has numbered its issues 5-22, with no issues 1-4. While most of the parties' issues
17 seem distinct, Neighbors' Issue 1 duplicates Owners' Issue 5, and Neighbors' Issue 3 may
18 duplicate Owners' Issue 17 (which challenges Ordinance No. 18-14C).
19

20 **To clarify and assist in an orderly consideration of the issues presented,**
21 **counsel for Owners and Neighbors are asked to review the list of issues attached as**
22 **Appendix A and suggest a consolidated list of issues by February 12, 2019.**⁴ WAC
23 242-03-260(1) provides that a petition may be amended as a matter of right until fourteen
24 days after filing, but the amendments are limited to amending the legal bases for
25 challenging the matter raised and may not raise new challenges.
26

27 **IV. PRELIMINARY SCHEDULE**

28 Notice is given in the table below of the Preliminary Schedule for hearings as well as
29 for filing of briefs and documents with the Board. **Please also file your documents**
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32 ³ Neighbors' PFR at 2-3.

⁴ It is not necessary for both petitioners to assert all the same challenges, but it would be helpful to clarify which issues, if any, are duplicative.

electronically, in Word format, at central@eluho.wa.gov.

January 22, 2019	Owners' Petition Filed
January 29, 2019	Neighbors' Petition Filed
January 31, 2019	Order of Consolidation, Notice of Hearing and Preliminary Schedule
February 12, 2019	Consolidated Issues Due
February 15, 2019 10:00 a.m.	Telephonic Prehearing Conference – Call 1 (800) 704-9804 and use pin 4472777#
February 21, 2019	Index Due (Respondent to file)
February 22, 2019	Anticipated Date of Prehearing Order ⁵
February 28, 2019	Additions to Index (parties to confer)
March 7, 2019	Deadline for Dispositive Motions and for Motions to Supplement the Record (proposed supplements to be attached)
March 18, 2019	Deadline for Response to Dispositive Motions or Motions to Supplement the Record
March 25, 2019	Deadline for Reply to Dispositive Motions (optional)
April 8, 2019	Anticipated date of Order on Motions
April 22, 2019	Deadline for Petitioners' Prehearing Brief (with exhibits)
May 13, 2019	Deadline for Respondent's Prehearing Brief (with exhibits)
May 28, 2019	Deadline for Petitioners' Reply Brief (optional)
June 12, 2019 10:00 a.m.	Hearing on Merits of Petition Location to be determined
July 29, 2019	Final Decision and Order

V. PREHEARING CONFERENCE

At the Prehearing Conference, the parties should be prepared to discuss the action being challenged, the nature of the claims asserted in the Petition for Review, and the framing of the legal issues to be decided.

The Respondent should be prepared to indicate the nature of any dispositive motion it intends to file. The parties are advised that the Board will normally only decide the

⁵ WAC 242-03-545(2). Any objection to such order shall be made in writing within seven days after the date the order is dated.

1 following issues on motions: timeliness of the filing of the petition for review, standing to
2 raise the claims in the petition, and subject-matter jurisdiction. The Presiding Officer may
3 ask for stipulations concerning threshold matters that are not in dispute, if any.

4 The case schedule will be discussed at the prehearing conference and may be
5 modified to fit the needs of the parties insofar as the Board determines it can reasonably
6 accommodate them and meet its statutory deadlines. Thereafter, any changes to the
7 schedule must be proposed by motion.
8

9 VI. RULES OF PROCEDURE

10 The Board's Rules of Practice and Procedure, found in the Washington
11 Administrative Code (WAC) at Chapter 242-03 WAC, shall apply to the proceedings in this
12 case.⁶
13

14 VII. SETTLEMENT AND MEDIATION

15 **Prior to the prehearing conference the Board expects the parties to engage in**
16 **at least one settlement discussion.** At the prehearing conference, the parties will report
17 on their interest in further settlement discussions. If the parties agree that a member of the
18 Growth Management Hearings Board who is not on the designated panel could be of
19 assistance by serving as a settlement officer, the Presiding Officer will appoint a settlement
20 officer to assist the parties in resolving any or all of the issues presented in the Petition for
21 Review. If the parties reach settlement, the Presiding Officer shall be notified, and a Joint
22 Motion for Dismissal filed with the Board. If settlement is not reached on all issues, the case
23 will proceed as scheduled. The parties are advised that the Board may extend the 180-day
24 decision deadline for the purposes of settlement, for up to ninety days pursuant to RCW
25 36.70A.300(2)(b).
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29 VIII. INTERPRETERS AND ACCOMMODATIONS

30 If a limited-English speaking or hearing impaired party needs an interpreter for any
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⁶ The Board's handbook, available on the website, may also be useful to the parties.

1 hearing, a qualified interpreter will be appointed at no cost to the party or participant. A form
2 for a request for an interpreter is attached to this Notice.

3 4 IX. THE INDEX

5 **Index** - Pursuant to WAC 242-03-510, within 30 days of service of the petition the
6 Respondent shall prepare an Index that lists all documents considered by the Respondent
7 in taking the challenged action. Each document included in the Index should be given a
8 unique number for identification purposes and to avoid duplication. Thereafter documents
9 should be referenced by their index number when attached as exhibits to briefs.

10
11 The Petitioners shall review the Index prepared by the Respondent promptly and
12 notify the Respondent of any omissions they believe have occurred. If the Respondent
13 agrees, it shall file an Amended Index.

14 If there is a disagreement over whether the item should be included in the record, the
15 proponent may file a motion to supplement the record, attaching the disputed documents
16 and explaining why the party believes the document is necessary or of substantial
17 assistance in the determination of the issues. Supplementation may be permitted "if the
18 board determines that such additional evidence would be necessary or of substantial
19 assistance to the board in reaching its decision." RCW 36.70A.290(4).

20 21 22 X. EXHIBITS

23 The Index shall contain a list of all of the documents considered by the Respondent
24 in taking the challenged action. However, only those documents that are presented to the
25 Board as exhibits are part of the evidence. To become part of the evidence, an exhibit must
26 be presented to the Board as an exhibit to a brief or motion and so marked. **Exhibits shall**
27 **be attached to the brief in which they are referenced and shall include the Index**
28 **number(s) from which they are drawn.** A table of exhibits is required for the hearing
29 briefs. **Parties shall tab the exhibits** for the benefit of Board members **using the**
30 **appropriate index number.**
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1 **XI. FAILURE TO ATTEND OR PARTICIPATE**

2 A party who fails to attend or participate in any hearing or other stage of the
3 adjudicative proceedings before the Board in this case may be held in default and an order
4 of default or dismissal may be entered pursuant to WAC 242-03-710.
5

6 **XII. COMMUNICATION WITH THE BOARD**

7 Pursuant to RCW 34.05.455, the parties may not communicate ex parte with the
8 presiding officer or other Board members. The parties are directed to Desiree Ortiz,
9 Administrative Assistant to the Board, at (360) 664-9170, or email at central@elaho.wa.gov,
10 who shall be the Board's contact for any questions.
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12 DATED this 31st day of January 2019.
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15 Cheryl Pflug, Presiding Officer
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INTERPRETER REQUEST

Case No. 19-3-0002c

**7800 Plaza Owners Association and Concerned Neighbors for the Preservation of Our
Community (Owners and Neighbors) v. City of Mercer Island**

I request that an interpreter be present as follows (Please circle as appropriate):

1. Limited English-speaking ability. My primary language is _____
(Indicate language)
2. Hearing impaired.

Dated this _____ day of _____ 2019.

Signature: _____
Party

Mail to:

**Growth Management Hearings Board
P.O. Box 40953
Olympia, WA 98504-0953**

APPENDIX A: Owners' & Neighbors' Issue Statements

Owners' & Neighbors' Issue Statements

Owners	Neighbors
Ordinance 18-13 (CPA)	Ordinance 18-13 (CPA)
<p>5. By failing to provide mailed notice of the Planning Commission hearings regarding the Comprehensive Plan ordinance, including a failure to provide mailed notice when Amendment 15 was added to the docket by Resolution 1545, did the City violate its own public participation program, described in MICC 3.46.080; 19.15.050.D.2.d; 19.15.010; 19.15.020.D, E (all citations to former code), and as required by the GMA, RCW 36.70A.035; RCW 36.70A.140; and the GMA implementing regulations, WAC 365-196-600(3); WAC 365-196-600(10)?</p>	<p>1. By failing to provide mailed notice of the Planning Commission hearings regarding the Comprehensive Plan ordinance, including a failure to provide mailed notice when Amendment 15 was added to the docket by Resolution 1545, did the City violate its own public participation program, described in MICC 3.46.080; 19.15.050.D.2.d; 19.15.010; 19.15.020.D, E (all citations to former code), and as required by the GMA, RCW 36.70A.035; RCW 36.70A.140; and the GMA implementing regulations, WAC 365-196-600(3); WAC 365-196-600(10)?</p>
	<p>2. By failing to identify "obvious technical error in the information contained in the comprehensive plan" or "changing circumstances in the city as a whole" that would justify this ordinance, as required by MICC 19.15.020.G.1 (former); MICC 19.15.230.F (current), did the City disregard its own procedures for amending its comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?</p>
	<p>5. Is the amendment inconsistent with county-wide planning policies DP-39 and DP-44, and GMA policy WAC 365-196-405(2)(k), all of which allow only compatible growth, in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current); RCW 36.70A.100; RCW 36.70A.130; RCW 36.70A.140; RCW 36.70A.210(1); WAC 365-106-040(2); WAC 365-196-010(1)(d);</p>

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	WAC 365-196-600(3); WAC 365-196-305(3); WAC 365-196-600(10)?
	6. Is the amendment inconsistent with Mercer Island Comprehensive Plan goals and policies LU 15; LU 15.1; LU 15.2; LU 15.4; LU 16; LU 16.1, all of which protect single-family neighborhoods, thereby creating an internally consistent comprehensive plan in violation of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?
	10. By analyzing Mercer Island Comprehensive Plan policy LU 17.4 but failing to analyze the broader policy LU 17, which promises not to change existing commercial designations and uses, did the City disregard the criteria of MICC 19.15.020.G.1 (former); MICC 19.15.230.F.1 (current), and create an internally inconsistent comprehensive plan, in violation of RCW 36.70A.070; RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-500; WAC 365-196-600(3); WAC 365-196-600(10)?
	11. By applying a new land use designation (community facilities) to a specific property, even though no zoning regulations currently exist that will apply to the new designation because there is not yet any community facilities zone in the land use code, did the City fail to show that "The property is suitable for development in conformance with the standards under the potential zoning," MICC 19.15.020.G.1.b.ii (former); MICC 19.15.230.F.2.b (current), in violation of RCW 36.70A.130; RCW 36.70A.140;

	WAC 365-196-600(3); WAC 365-196-600(10)?
	12. By creating a new land use designation (community facilities), and applying that new designation to a specific property, but without adopting new development regulations that would apply to the new designation, did the City create an inconsistency between its comprehensive plan and its zoning regulations, in violation of RCW 36.70A.040 and the holding in City of Bremerton v. Kitsap County, GMHB 04-3-0009c, at 10 (Final Decision and Order, Aug. 9, 2004)?
6. By adopting the Comprehensive Plan ordinance without placing Amendment 15 on the annual comprehensive plan amendment docket, as required by MICC 19.15.050.D (former) and MICC 19.15.230.C (current), and without declaring an emergency as required by RCW 36.70A.130(2)(b) and WAC 365-195-640(4), did the City fail to consider all amendment proposals concurrently, no more frequently than once per year, and as part of the docket cycle, as required by RCW 36.70A.130(2); RCW 36.70A.470; WAC 365-196-640(3); WAC 365-640(6); and WAC 365-196-600(3)(a)(i)?	
7. By amending the comprehensive plan land use map to change a portion of Aubrey Davis Park from "linear park" to "town center," did the City disregard the provisions in the comprehensive plan protecting parks, including Land Use Goal 19; LU 19.2; Parks and Recreation Plan Goal 2.b; 2.c; 3; and 5.a, thereby creating an internally inconsistent plan in violation of MICC	

1	19.15.020.G.1.a (former), MICC	
2	19.15.230.F.1 (current), and RCW	
3	36.70A.070?	
4	8. By amending the comprehensive plan	
5	to change a portion of Aubrey Davis	
6	Park from “linear park” to “town center,”	
7	did the City create an internal	
8	inconsistency with the provisions in the	
9	comprehensive plan limiting new multi-	
10	family development, including Land Use	
11	Goal 15; 15.3; 17; and 17.3, all in	
12	violation of MICC 19.15.020.G.1.a	
13	(former), MICC 19.15.230.F.1 (current)	
14	and RCW 36.70A.070?	
15	9. By amending the comprehensive plan	
16	to change a large portion of the Greta	
17	Hackett Outdoor Sculpture Gallery from	
18	“linear park” to “town center,” did the	
19	City violate the requirements in MICC	
20	19.15.230.F.2 (current) and MICC	
21	19.15.020.G.1.a (former) that site-	
22	specific amendments must be	
23	compatible with the adjacent land use	
24	and development patterns and must	
25	benefit the community as a whole and	
26	must not adversely affect community	
27	facilities, all in violation of RCW	
28	36.70A.130; RCW 36.70A.140; WAC	
29	365-196-600(3); WAC 365-196-	
30	600(10)?	
31	10. By failing to make the findings	
32	required under MICC 19.15.230.F	
	(current) and MICC 19.15.020.G.1	
	(former), did the City disregard its own	
	procedures for amending	
	comprehensive plans, in violation of	
	RCW 36.70A.130; RCW 36.70A.140;	
	WAC 365-196-600(3); WAC 365-196-	
	600(10)?	
	11. By amending the comprehensive	
	plan to eliminate a portion of the Greta	

1	Hackett Outdoor Sculpture Gallery,	
2	even though the 2014-2019 Parks and	
3	Recreation Plan Capital Improvement	
4	Projects List and the Mercer Island	
5	2017-2022 Capital Improvement Fund	
6	both identified funds for improvements	
7	to the sculpture gallery, did the City	
8	violate the requirements to create and	
9	follow an internally consistent capital	
10	facilities plan and budget, RCW	
11	36.70A.070(3) and (8); RCW	
12	36.70A.120?	
13	12. By amending the comprehensive	
14	plan to allow high-density residential	
15	and commercial development without	
16	amending the capital facilities and	
17	transportation elements, without	
18	updating the City's traffic forecasts, and	
19	without providing for the financing of	
20	necessary transportation improvements	
21	and other capital improvements, did the	
22	City fail to show its work and violate the	
23	requirements of RCW 36.70A.070(3)	
24	and RCW 36.70A.070(6)?	
25	13. By amending the comprehensive	
26	plan to allow the construction of a City-	
27	owned commuter parking lot, without	
28	updating the City's traffic forecasts, and	
29	without providing for the financing of	
30	necessary transportation improvements	
31	and other capital improvements, did the	
32	City fail to show its work and violate the	
	requirements of RCW 36.70A.070(3)	
	and RCW 36.70A.070(6)?	
		4. By adopting a site-specific
		comprehensive plan amendment without a
		site-specific rezone, even though the City
		acknowledges that a rezone will ultimately
		be required, did the City violate the
		requirement to consider an amendment and
		a rezone together when both are required,
		MICC 19.15.050.F (former); MICC

	19.15.230.G (current), in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?
Ordinance 18-14C (Rezone)	Ordinance 18-14C (Rezone)
14. By failing to provide mailed notice of the Planning Commission hearings regarding the rezone ordinance, did the City violate its own public participation program, described in MICC 19.15.010 and 19.15.020.D, E (former), and required by RCW 36.70A.035; RCW 36.70A.130(2); RCW 36.70A.140; and WAC 365-196-600(3); WAC 365-196-600(10)?	
15. By rezoning the property from “public institution” to “town center,” did the City adopt a development regulation that is inconsistent with and fails to implement the comprehensive plan policies protecting parks, including Land Use Goal 19; LU 19.2; Parks and Recreation Plan Goal 2.b; 2.c; 3; and 5.a, all in violation of MICC 19.15.020.G.2 (former) and MICC 19.15.240.C (current), and RCW 36.70A.040(3), RCW 36.70A.130(1)(d)?	
16. By rezoning the property from “public institution” to “town center,” did the City adopt a development regulation that is inconsistent with and fails to implement the comprehensive plan policies limiting new multi-family development, , including Land Use Goal 15; 15.3; 17; and 17.3, all in violation of MICC 19.15.020.G.2.a (former), MICC 19.15.240.C.1 (current) and RCW 36.70A.040(3), RCW 36.70A.130(1)(d)?	
17. By failing to make the findings required by MICC 19.15.020.G.2 (former) and MICC 19.15.240.C (current), did the City fail to follow	3. By adopting a site-specific amendment to its comprehensive plan without making the additional findings for site-specific amendments required by MICC

1 2 3 4 5	procedures as required by RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?	19.15.020.G.1.b (former); MICC 19.15.230.F.2 (current), did the City disregard its own procedures for amending comprehensive plans, in violation of RCW 36.70A.130; RCW 36.70A.140; WAC 365-196-600(3); WAC 365-196-600(10)?
6 7 8 9 10 11 12 13 14 15	18. By rezoning the property to eliminate a portion of the Gretta Hackett Outdoor Sculpture Gallery, even though the 2014-2019 Parks and Recreation Plan Capital Improvement Projects List and the Mercer Island 2017-2022 Capital Improvement Fund both identified funds for improvements to the sculpture gallery, did the City adopt a development regulation that fails to be consistent with and implement the comprehensive plan, in violation of RCW 36.70A.130(1)(d) and RCW 36.70A.040(3)?	
16 17 18 19 20 21 22 23 24 25 26 27	19. By rezoning the property from "public institution" to "town center," did the City violate the requirement in MICC 19.05.010.B (current and former) that "the entire area within the Mercer Island I-90 right-of-way, including...recreations areas, linear greenbelts... shall be part of the public institution zone," in violation of the Board's holding that the GMA implicitly requires development regulations to be consistent with one another? See <i>West Seattle Defense Fund v. City of Seattle</i> , CPSGMHB No. 95-3-0040, Final Decision and Order (Sep. 11, 1995), at 7-8?	
28 29 30 31 32	20. By rezoning the property from "public institution" to "town center" in order to develop new residential and other uses on the property, did the City violate the requirement in MICC 19.05.010.B (current and former) that "all uses within the I-90 right-of-way	

1 shall be maintained as set forth in city-
2 approved I-90 related documents,” in
3 violation of the Board’s holding that the
4 GMA implicitly requires development
5 regulations to be consistent with one
6 another? See *West Seattle Defense*
7 *Fund v. City of Seattle*, CPSGMHB No.
8 95-3-0040, Final Decision and Order
9 (Sep. 11, 1995), at 7–8?

10 21. If the Board finds the
11 Comprehensive Plan ordinance violates
12 the GMA, should the rezone ordinance
13 also be found in violation and
14 remanded, because the rezone
15 ordinance is based on the
16 Comprehensive Plan ordinance, and
17 development regulations must be
18 consistent with and implement the
19 comprehensive plan, per RCW
20 36.70A.130(1)(d) and RCW
21 36.70A.040(3)?

22 **SEPA**

23 22. By failing to update the July 30,
24 2018 SEPA Determination of Non-
25 significance (which purports to analyze
26 both the Comprehensive Plan ordinance
27 and the rezone ordinance), even after
28 substantial new information about the
29 development proposals emerged in
30 response to the City’s Request for
31 Proposals prior to the November 20,
32 2018 City Council vote, did the City
violate SEPA’s requirement to conduct
the earliest review possible once the
features of a project can be identified,
and update such review in light of new
information, MICC 19.07.120.I.5
(current and former) WAC 197-11-055;
WAC 197-11-340(3)(a)?